

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

THURSDAY, THE 9TH NOVEMBER 2006 / 18TH KARTHIKA 1928

CRL.A.No. 2117 of 2006()

AGAINST THE ORDER DATED 22/02/2006 IN MC 33 2006 IN
SC.1381/2005 of ADDL. SESSIONS COURT (ADHOC), KOLLAM
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APPELLANT: COUNTER PETITIONER

ABDUL AZIZ, S/O. MOHAMMED IBRAHIM,
KOCHUVEEDU, KOLLAM EAST MURI,
KOLLAM DISTRICT.

BY ADV. SRI.C.R.JAYAKUMAR

RESPONDENTS: PETITIONER

STATE OF KERALA, REPRESENTED BY
THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.THOMAS JOHN AMBOOKER

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION
ON 09/11/2006, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

K.HEMA, J.

CRL.A.NO.2117 OF 2006

Dated this the 9th day of November, 2006

JUDGMENT

This appeal is filed under Section 449 of the Code of Criminal Procedure ('the Code', for short). The appellant is one of the sureties of the accused, who executed a bond for appearance of the accused before the trial court. The court, on finding that the bond has been forfeited, imposed a penalty of Rs.10,000/- on the appellant. In default of payment of penalty and if the amount is found irrecoverable, the petitioner was sentenced to undergo imprisonment for six months in civil prison. The said order is under challenge in this appeal.

2. A reading of the order under challenge shows that it is per se illegal. Firstly, the court immediately on finding that the bond has been forfeited, has directed the appellant to remit the penalty of Rs.10,000/-. As per Section 446 of the Code, the Court, on proof of the satisfaction that the bond has been forfeited, shall record grounds of such proof and then call upon the person who has committed breach of the bond to pay the penalty or to show cause why the penalty shall not be paid. But the Court has not recorded such grounds of "proof" and called upon the surety, after entering a finding that the bond has been forfeited to pay the penalty or show cause why the penalty shall not be paid. Both the above mandatory requirements are to be complied with by the court below before a direction is made to remit the penalty. Since the order is passed in violation of the provision to Section 446 of the Code, the order is illegal.

3. It can also be seen that the court has sentenced the appellant to undergo imprisonment for six months in civil prison even before the appellant is given an opportunity to pay the penalty or even before taking steps for recovery of the penalty. It is only after the appellant is given an opportunity to make the payment and steps are taken to recover the penalty that a person can be sentenced to undergo imprisonment in civil prison as per

Section 446 of the Code. This is for the reason that a proper sentence can be fixed by the court only after taking into consideration the amount, if any, paid or recovered. In the absence of the same, the court cannot fix a proper sentence. Hence awarding of maximum sentence of six months at a premature stage is illegal and improper. For this reason also the order under challenge is illegal.

4. Learned counsel for the appellant submitted that the accused has already appeared before the court. He was absent only because he was sick and hospitalised. He is a physically handicapped person. He could not inform the court of the hospitalisation. The appellant was also not aware of the proceedings initiated against him and this fact could not be brought to the notice of the court. The absence of the accused was not willful as evidenced by Annexures A1 and A2 medical certificates produced in this Court. The court has not enquired into the question whether the accused was actually absconding or not. The court has acted upon the alleged report that the accused is absconding, without calling for proof of the same. Therefore, the court has not applied its mind to find out whether there is a willful default on the part of the accused and whether he was absconding, which will lead to forfeiture of bond and consequently penalty. It is submitted that the accused has already appeared before the court and he is granted bail.

5. In the above circumstances, I find that the order under challenge is unsustainable and it is to be set aside.

6. The order under challenge is set aside. Further proceedings, if any, initiated on the basis of the impugned order shall stand dropped.

The appeal is allowed.

K.HEMA, JUDGE

vgs.